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No. 80-665

In The

Supreme Court of the United States

October Term, 1980

SOUTHLAND NEWS, INC., a Kentucky corporation,

Petitioner,

vs.

THE CITY OF SPRINGFIELD, an Illinois municipal corporation, and MICHAEL HOUSTON, in his capacity as Mayor of the City of Springfield,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the lower federal courts erred in the application of the abstention doctrine of *Younger v. Harris*, 401 U. S. 37 (1971), by directing dismissal of petitioner's federal civil rights action, where that suit seeks prospective relief to invalidate a prior restraint by respondents on the exhibition of motion picture films, and seeks no interference or annulment of a pending municipal court charge against petitioner's manager.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Southland News, Inc., a Kentucky corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 27, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is an unpublished *per curiam* opinion

rendered June 27, 1980. A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U. S. C. § 1254 (1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. A written *per curiam* opinion was issued by that court on June 27, 1980, with one justice dissenting. The petitioner, Southland News, Inc., timely filed a petition for rehearing and suggestion for rehearing *in banc*. That petition was denied by split vote of the panel which rendered the original decision, and of the circuit judges of the Court of Appeals on September 5, 1980. A copy of the order denying rehearing *in banc* is included in the Appendix as Exhibit B.

The petitioner's request for stay of the mandate in this cause pending review by certiorari to the United States Supreme Court was denied by Circuit Judge Cummings on September 23, 1980. The record in this cause was lodged with the Clerk of the United States District Court for the Central District of Illinois, Springfield, Illinois, on October 1, 1980, with the return of the mandate to that court. Although the mandate has issued, the United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals for the Seventh Circuit regardless of the status of the mandate. *Carr v. Zaja*, 283 U. S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers*, 330 U. S. 464, 468 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the United States Constitution, and the Springfield Theater License Ordinance, Chapter 42A of the Code of Ordinances of the City of Springfield, are set forth in the Appendix as Exhibit C.

STATEMENT OF THE CASE

The Frisina Theater, located in a southern residential neighborhood of Springfield, Illinois, had been operated for many years by Frisina Enterprises, Ltd., as a general release motion picture theater. It was licensed under the Springfield Theater License Ordinance, Chapter 42A of the Code of Ordinances of the City of Springfield, but its license expired on December 31, 1979. Nevertheless, the theater continued to operate until February 20, 1980, at which time it changed ownership.

European Investments, a Bahamian corporation, bought the land and building, and new management commenced operating the theater. The format and content of the exhibition of films changed, commencing February 20, 1980. Two films, "Deep Throat" and "Devil in Miss Jones", were exhibited on that and following days. On February 21, 1980, Larry Hall was brought in by Mike Jollay, a business broker, to learn the management and operation of the Frisina Theater.

Springfield Mayor Michael Houston immediately received complaints about the content of the motion pictures. These complaints centered on the "pornographic" nature of the movies and the location of the theater near a residential neighborhood. He was subjected to pressure from churches, business interests, and citizens proximate to the theater location, asking him to get rid of the theater—to close it down.

On February 28, 1980, Mayor Houston directed the Chief of Police, Howard Rogers, to see if the chief could do something about closing the theater since it was the mayor's understanding that the Frisina Theater was operating without a license. Chief Rogers, after ascertaining that the Frisina Theater indeed had no license, went to the theater on the afternoon of February 29, 1980. Chief Rogers arrested Larry Hall twice in two visits and, in the process, an officer accompanying Chief Rogers ordered the theater closed. Chief Rogers finally extracted an agreement from Larry Hall that no motion picture films would be exhibited until a license had been obtained under the Springfield Theater License Ordinance, Chapter 42A. This agreement was obtained by Chief Rogers under the threat of physical custodial arrest of all employees.

On March 10, 1980, Larry Hall filed the necessary documents to qualify Southland News, Inc., an inactive Kentucky corporation, to do business in Illinois. Hall was the president of the corporation and was to serve as manager of the Frisina Theater. Southland News, Inc., on March 11, 1980, filed an application for a theater license under Chapter 42A, using the form supplied for such an application by the Springfield City Clerk's Office. Although the

completed form indicated that it was for a corporate applicent, it neglected to state that Southland News, Inc. was the corporation's name. All other information requested by the form and the ordinance was provided, and Larry Hall signed the application as the theater's manager.

Also on March 11, 1980, Mayor Michael Houston sent a form letter in response to the many written complaints and inquiries he had received regarding the Frisina Theater's new mode of operation. This letter read:

> "Thank you for your letter concerning the Frisina Cinema and its conversion to the showing of X-rated movies. I share your concerns regarding this situation, and have instructed our legal department to research what might be done to correct it.
>
> Recently, I ordered the theater closed on a legal technicality. That is, they were operating without a theater license. I expect they will apply for a license, and based on the City Code, that license must be granted. All I can do is make sure that a thorough background investigation is completed to make sure all City Code requirements are met.
>
> I have directed Police Chief Howard E. Rogers to conduct spot checks of this theater and every theater so that there are no violations of the law regarding the admittance of persons under the age of 17 into R-rated and X-rated movies, and to thoroughly investigate any such complaints.
>
> Any complaints that the theater is showing obscene materials should be directed to the Sangamon County State's Attorney's Office for prosecution according to state obscenity statutes.
>
> Thank you again for expressing your concerns in this matter. I hope that Springfield area residents will not support the film offerings of the Frisina and guaran-

tee you that I will do everything legally possible to correct the situation."

After reviewing the application for a theater license submitted by Southland News, Inc., Mayor Houston requested that Assistant Corporation Counsel James Parente summon Larry Hall for an oral interrogation about the Frisina Theater. He did so because there had been press reports that one of the owners of the theater was under indictment in a federal obscenity case. Parente and Mayor Houston felt that full disclosure of all persons touching and concerning the theater could be forced by interrogating Larry Hall, and the theater license application might be deniable pursuant to provisions of 42A.6 of the Springfield Theater License Ordinance. That section contains the following grounds for denial:

"No license authorized by this chapter shall be issued to:

(1) *Persons not of good character.* A person who is not of good character and reputation in the community in which he resides.

(2) *Persons convicted of felony.* A person who has been convicted of a felony under the laws of the state or of the United States.

(3) *Persons convicted of keeping house of ill fame.* A person who has been convicted of being the keeper or is keeping a house of ill fame.

(4) *Persons convicted of pandering, etc.* A person who has been convicted of pandering or other crime or misdemeanor opposed to decency and morality.

(5) *Revocation of former license.* A person whose license issued under this chapter has been revoked for any cause.

(6) *Former convictions of federal or state law.* A person who has been convicted of a felony or crime punishable by a term in a penitentiary as result of violation of any federal or state law."

The City of Springfield through this interrogation was focusing on the concept of "control", that is, the City of Springfield felt it had the right to know all of the individuals and organizations involved with the Frisina Theater, no matter how tangential that involvement.

The oral examination of Larry Hall was conducted by Assistant Corporation Counsel Parente on March 20, 1980. Questions directed to Hall regarded the mode of operation of the theater, film booking, advertising practices, accounting procedures, and Larry Hall's management experience. When the answers did not satisfy Parente as to who was in control of the Frisina Theater, he recommended denial of the theater license pending full disclosure in the license application of all names of individuals and organizations exercising any degree of control over the Frisina Theater. His advice was accepted and implemented by Mayor Houston, who denied the license application of Southland News, Inc. on March 21, 1980.

On March 28, 1980, Assistant Counsel Parente filed a complaint in the Municipal Court in the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, charging Larry Hall with a violation of § 42A.2 of the Springfield City Code, operating a theater without a license, from February 21, 1980 to February 29, 1980. He sent a copy of the complaint to Larry Hall's attorney, John Lynaugh, together with a notice of a hearing for arraignment on the charge on April 28, 1980.

With the City of Springfield continuing to deny Southland News, Inc.'s request for theater license, the petitioner filed an omnibus federal civil rights action pursuant to 42 U. S. C. § 1983 in the United States District Court for the Central District of Illinois, Springfield, Illinois. The complaint sought declaratory and injunctive relief against the City of Springfield and Mayor Michael Houston, attacking the Springfield Theater Licensing Ordinance facially and as applied, pursuant to 28 U. S. C. §§ 1331, 1343, 2201 and 2202. It was urged that the ordinance and the actions of Springfield city officials had violated Southland News, Inc.'s rights under the First and Fourteenth Amendments to the Constitution of the United States and that a prior restraint had thereby been imposed. The relief sought by this complaint was prospective only; that is, no interference or annulment of any state court proceeding against Larry Hall was sought. The complaint sought a temporary restraining order and preliminary and permanent injunctive relief to allow the Frisina Theater to operate and exhibit motion picture films.

On April 7, 1980, the matter came before Judge Harold Baker on Southland News, Inc.'s request for a temporary restraining order. Although the City of Springfield did not raise the issue of abstention, because it felt that Southland News, Inc. and Larry Hall were separate parties for purposes of the suit, Judge Baker raised the issue *sua sponte,* and denied the request for a temporary restraining order. He directed briefs on the issue of abstention and scheduled a hearing on the request for preliminary injunctive relief and the abstention issue for April 17, 1980.

At the April 17, 1980 hearing, Southland News presented evidence in support of the preliminary injunction,

but Judge Baker never reached the merits of the claimed unconstitutionality of the Springfield Theater License Ordinance, holding that the case pending against Larry Hall in the municipal trial court required him to abstain under the doctrine of *Younger v. Harris,* 401 U. S. 37 (1971). On the abstention issue, he rejected all arguments by Southland News regarding the separateness of the parties, Larry Hall and Southland News, Inc., and arguments pointing out that the prospective nature of the relief sought would not require abstention, under this Court's holding in *Wooley v. Maynard,* 430 U. S. 705 (1977). Judge Baker's written order denying preliminary injunction to Southland News was entered April 18, 1980. A copy of this order is included in the Appendix as Exhibit D.

An expedited appeal was granted by the United States Court of Appeals for the Seventh Circuit because of the serious questions presented on the abstention doctrine. Briefs were filed and the cause was advanced for oral argument held on May 15, 1980.

On June 27, 1980, in an unpublished *per curiam* opinion, the Court of Appeals for the Seventh Circuit, with Judge Swygert dissenting, affirmed the district court and directed that Southland's federal civil rights suit be dismissed in light of the holding that abstention under *Younger v. Harris,* 401 U. S. 37 (1971), was required. In its *per curiam* opinion, the Court of Appeals held that Southland and Larry Hall were inseparable for purposes of abstention consideration, and that it was of no moment that prospective relief only was sought by the federal complaint. The court held that abstention under *Younger v. Harris* was mandated, and that no exception of bad faith

or patent unconstitutionality of the Springfield Theater License Ordinance, Chapter 42A, had been shown.

Southland timely filed a petition for rehearing and suggestion for rehearing *in banc*. This petition was denied by a split vote of the original panel, and of the sitting circuit judges of the Court of Appeals for the Seventh Circuit on September 5, 1980. Over petitioner's objection, the mandate was returned to the district court by Judge Cummings on October 1, 1980.

While this cause was pending, Larry Hall was found guilty in Sangamon County Circuit Court of the city ordinance violation of operating a theater without a license and was fined $25, in a cause entitled *City of Springfield v. Larry Hall*. His motion to dismiss attacking the facial constitutionality of the Springfield Theater License Ordinance was denied. That case is now on appeal to the Appellate Court of Illinois, Fourth District, Springfield, Illinois.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with decisions of lower federal courts of other circuits, regarding application of the Abstention Doctrine of Younger v. Harris, 401 U. S. 37 (1971), in light of Wooley v. Maynard, 430 U. S. 705 (1977), where prospective civil rights relief only is sought in a suit brought pursuant to 42 U. S. C. § 1983.

This case presents a serious and significant question regarding federal court abstention under the rule first pronounced by this Court in *Younger v. Harris,* 401 U. S. 37 (1971). There the Court held that for reasons of comity, judicial economy and federal-state relationships, a federal court should exercise abstention and not take jurisdiction over a federal civil rights injunctive action that sought interference with a pending state court criminal proceeding. In a companion case, *Samuels v. Mackell,* 401 U. S. 66 (1971), the abstention doctrine was held equally applicable to a suit seeking federal declaratory relief in the face of a pending state court proceeding. Where there is no pending state case, the *Younger* principles of comity, judicial economy and federalism have been held to have no application, thus allowing a federal court to grant federal declaratory relief concerning the facial constitutionality of a challenged state statute. *Steffel v. Thompson,* 415 U. S. 452 (1974).

Every federal plaintiff is entitled to separate consideration for abstention purposes under *Doran v. Salem Inn, Inc.,* 422 U. S. 922, 928, 929 (1975); however, where no proceedings of substance have occurred in federal court, and state proceedings thereafter commence, *Younger* principles will still apply in a suit that seeks interference with those state proceedings, and the federal court must exercise equitable restraint concerning a challenge to a state statute. *Hicks v. Miranda,* 422 U. S. 332 (1975). The *Younger* principles are equally applicable to a pending state civil proceeding, and a federal court will not serve as a substitute for state appellate courts, thus requiring a federal plaintiff to utilize all state appellate remedies prior

to coming to federal court. *Huffman v. Pursue, Ltd.*, 420 U. S. 592 (1975).

The line of abstention cases decided by this Court subsequent to *Younger* did not immediately reach the question of the availability of federal injunctive and declaratory remedies where a federal plaintiff prayed for prospective relief only, and where no interference with pending state court proceedings was sought. This question regarding prospective federal civil rights relief was addressed by this Court in *Wooley v. Maynard*, 430 U. S. 705 (1977).

In *Wooley v. Maynard*, the federal plaintiff, Maynard, was a Jehovah's Witness. He had been arrested three times under a New Hampshire statute which made it unlawful to cover up the state motto, "Live Free or Die", on automobile license plates. He had been fined on the first arrest and conviction, sentenced to 15 days in jail and fined on a second arrest and conviction, and not sentenced on the third conviction. He had not appealed any of his state court cases to state appellate courts although he had asserted in state court that his First Amendment rights of religious freedoms and belief were being violated by the statute's operation. Instead, he filed a federal civil rights action attacking the constitutional validity of the New Hampshire statute and seeking prospective relief enjoining its enforcement against him in the future.

A three-judge federal court rejected the state's contention that abstention was mandated under *Younger v. Harris*, 401 U. S. 37 (1971), and *Huffman v. Pursue, Ltd.*, 420 U. S. 592 (1975). That court held the statute unconstitutional and issued a preliminary injunction barring future enforcement against Maynard. New Hampshire

officials appealed to the United States Supreme Court, and this Court affirmed, announcing sound principles to cover the situation where prospective relief only was sought, with no contemplated interference or annulment of the state court action.

The Court held that a litigant has a right, pursuant to 42 U. S. C. § 1983, to seek redress for deprivation of federal rights in federal court. Where there was an actual threat of criminal prosecution, the federal plaintiff cannot be forced to choose between intentionally violating a state law or foregoing what he believes to be constitutionally protected activity. In holding that priliminary injunctive and declaratory relief in *Wooley v. Maynard,* 430 U. S. 705 (1977), was proper, this Court found no bar because the federal plaintiff had not utilized the state court system to raise his federal constitutional claims:

> "Here, however, the suit is in no way 'designed to annul the results of a state trial' since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights. Maynard has already sustained convictions and has served a sentence of imprisonment for his prior offenses. He does not seek to have his record expunged, or to annul any collateral effects those convictions may have, *e. g.* upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes. *Younger* does not bar federal jurisdiction."
>
> *Wooley v. Maynard,* 430 U. S. at 711.

This Court's decision in *Wooley v. Maynard* has had a telling impact on lower federal court decisions where *Younger* abstention arguments are made in the face of a request for relief in federal civil rights actions that is prospective only. It is submitted that a conflict exists between the decision of the United States Court of Appeals

for the Seventh Circuit and federal courts of other circuits on the issue of prospective relief and the abstention doctrine. A prime example of the application of the prospective relief doctrine under *Wooley v. Maynard* occurred in *Boe v. Colello,* 438 F. Supp. 145 (S. D. N. Y., 1977).

In *Boe v. Colello,* an Orangetown, New York, township ordinance required the town clerk to issue licenses for the distribution of merchandise, including newspapers, based on that official's decision that he was "reasonably satisfied with the applicant's qualifications." The federal plaintiffs to a civil rights action sought only prospective injunctive and declaratory relief against the ordinance; those plaintiffs included some persons who had pending state cases for violation of the ordinance and others who did not. The federal district judge recognized that, if he abstained, the delay of state court proceedings would defeat the very purpose of the plaintiff's civil rights action—to vindicate their First Amendment rights in federal court by invalidating the imposition of a prior restraint. In announcing his decision, the district judge acknowledged the requirements of *Younger v. Harris,* 401 U. S. 37 (1971), and then paid full heed to the sound policy behind *Wooley v. Maynard:*

> "*Younger v. Harris* forecloses this Court from enjoining the pending criminal prosecutions scheduled for October 21st. As to the non-arrested plaintiffs, who face successive weekly arrests by the Orangetown officials if they ignore the unconstitutional licensing ordinance and exercise their right of free expression by selling *The Call,* there can be no doubt they are entitled to enjoin Orangetown officials from arresting and prosecuting them for alleged violations of the condemned statute. In view of the prior arrests of others for selling without a license, the threats to these plaintiffs are real—they are neither 'imaginary [n]or speculative.'

> "As to those plaintiffs already under prosecution but who face further arrests, there is no sound reason why the same Orangetown officials, proposing the same action as to them under an egregiously unconstitutional ordinance, should not also be enjoined from arresting them for alleged future violations. Those plaintiffs have already had the experience of prior arrests. It is not a first time experience for them. The threat of future arrests and prosecution, week in and week out, is real. They are not required to expose themselves to future repeated arrests and prosecutions, extending over an uncertain time period, in order to press their challenge to an ordinance which they claim—here successfully—deprives them of basic First Amendment rights. To require them to do so subjects them to irreparable injury. This is sufficient to justify equitable relief to them too."
>
> *Boe v. Colello,* 438 F. Supp. at 153.

Other district courts have made a similar analysis where the federal plaintiff sought only prospective relief against the operation of an ordinance or statute which was asserted to be in violation of the First and Fourteenth Amendments. *Eagle Books, Inc. v. Ritchie,* 455 F. Supp. 73, 75, 76 (N. D. Utah, 1978); *Natco Theatres, Inc. v. Ratner,* 463 F. Supp. 1124, 1127, 1128 (S. D. N. Y., 1979); *Penthouse International Ltd. v. McAuliffe,* 436 F. Supp. 1241, 1247-1249 (D. Ga., 1977), affirmed 610 F. 2d 1353 (5th Cir., 1980); *G & E Business Services, Inc. v. McAuliffe,* 480 F. Supp. 239, 240 (D. Ga., 1979); *Maguin v. Miller,* 433 F. Supp. 223, 227, 228 (D. Kan., 1977). Thus, federal district courts expressing holdings within the Second, Fifth, and Tenth Circuits have stated that under *Wooley v. Maynard,* 430 U. S. 705 (1977), a federal civil rights complaint that seeks prospective federal relief to redress constitutional deprivations, even in the face of arguable pending state proceedings, will not require federal court abstention.

In its opinion below, the Seventh Circuit Court of Appeals has refused to recognize any distinction where prospective relief only is sought in a federal civil rights action. It has ruled that *Younger v. Harris*, 401 U. S. 37 (1971), is fully applicable to the present situation, and that the petitioner Southland News, Inc.'s remedy is to contest the constitutionality of the Springfield Theater License Ordinance in the pending state court proceeding against Larry Hall. In so ruling, the federal court has allowed itself to become enmeshed with, and a part of, a system of prior restraint that has resulted in a total ban on the exhibition of any films at the Frisina Theater from February 29, 1980, up to the present date. Instead of addressing and protecting against the prior restraint imposed by the city officials, the district court and court of appeals in this cause have sanctioned and approved that restraint. It is submitted that this is constitutional error of the greatest magnitude.

In other cases this Court has refused to allow federal courts to sanction the imposition of prior restraints by municipal and state officials against performances or motion pictures whose content was deemed unacceptable by those officials. *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546 (1975); *Vance v. Universal Amusement Company, Inc.*, — U. S. —, 100 S. Ct. 1156 (1980). This Court's pronouncements that a system of prior restraints comes to court with a heavy burden against its constitutional validity, *Freedman v. Maryland*, 380 U. S. 51, 57 (1965), applies with equal force in this case, and stands as further ground to address the error of the United States Court of Appeals for the Seventh Circuit.

Thus, if the policies underlying the rulings in *Younger v. Harris*, 401 U. S. 37 (1971), and its progeny are not

offended by the granting of relief in federal civil rights cases, then that relief should be forthcoming. The other equally important policy manifest in "prospective relief" civil rights cases is that a federal plaintiff whose constitutional rights have been violated by state or municipal officials ought to be afforded a federal forum to vindicate those rights. This Court's constitutional concern to give citizens redress against municipalities in civil rights cases has been demonstrated by recent decisions. *Monell v. New York City Department of Social Services*, 436 U. S. 658 (1978); *Owen v. City of Independence, Missouri*, — U. S. —, 100 S. Ct. 1398 (1980). Citizen access to the federal forum receives greater emphasis where federal courts are asked to remedy deprivation of First Amendment rights that amount to the imposition of a prior restraint because of the high value our society places on freedom of expression. *Dombrowski v. Pfister*, 380 U. S. 479, 487 (1965).

In its complaint, Southland News, Inc. contends the Springfield Theater License Ordinance, Chapter 42A of the Springfield City Code, is patently unconstitutional. That ordinance allows for the imposition of a total restraint on First Amendment activity because no motion picture films can be shown at a theater without the granting of a license, through an application procedure based on vague, subjective and standardless provisions of the ordinance that permit a denial of a license based on a person's reputation, prior conviction for a felony or misdemeanor offense, and other equally abhorrent criteria. The abuse of that process is painfully demonstrated by the facts in this case, where city officials focused on a vague concept of "control" to try to force disclosure of all individuals and organizations connected with the Frisina Theater in the hope that a license could be denied under the "technicalities"

of the standardless provisions of the ordinance. The prior restraint presented by such a licensing ordinance, both facially and as applied, has been universally condemned by this Court. *Staub v. City of Baxley*, 355 U. S. 313, 325 (1958); *Shuttlesworth v. City of Birmingham*, 394 U. S. 147, 150, 151 (1969). Other state and federal courts have uniformly ruled such standardless licensing ordinances and statutes unconstitutional for infringement of First Amendment rights. *City of Seattle v. Bittner*, 81 Wash. 2d 747, 505 P. 2d 126 (1973); *Perrine v. Municipal Court*, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P. 2d 648 (1971); *City of Fitchburg v. 707 Main Corp.*, 343 N. E. 2d 149 (Mass., 1976); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N. W. 2d 370 (1975); *Hamar Theatres, Inc. v. City of Newark*, 150 N. J. Super. 14, 374 A. 2d 502 (1977); *Bayou Landing, Ltd. v. Watts*, 563 F. 2d 1172 (5th Cir., 1977); *Eagle Books, Inc. v. Richie*, 455 F. Supp. 73 (D. Utah, 1978); *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696 (M. D. Fla., 1978); *Natco Theaters, Inc. v. Ratner*, 463 F. Supp. 1124 (S. D. N. Y., 1979); *Ellwest Stereo Theatre, Inc. v. Jackson*, — F. Supp. — (No. C-79975A, N. D. Ga., 5/2/80).

The pending state court case against Larry Hall has not and will not afford Southland News, Inc. any relief regarding the invalidation of the prior restraint that has been imposed on its operation of the Frisina Theater. Any state court decision will not require a license to be issued to Southland News nor prevent the future prosecution of Southland News if it chooses to forego its lawful request for federal injunctive relief and operate in the face of the assertedly unconstitutional ordinance. Thus, Southland News has been placed in a position of having to flout an ordinance it feels is patently unconstitutional and suffer

the risk of multiple arrests and prosecutions in the future, or not operate the theater at all. The direct result has been that no motion picture films have been shown at the Frisina Theater. The state court proceedings will not afford Southland News, Inc. any opportunity to obtain redress from the unconstitutional prior restraint—the pertinent inquiry for requiring abstention. *Moore v. Sims*, 442 U. S. 415 (1979).

The erroneous decision of the Seventh Circuit Court of Appeals in the present case, calling for abstention even where prospective relief only is sought, is a decision of form over substance, which ignores the mandates of Congress and this Court to afford citizens civil rights relief against a municipality that has grossly offended First Amendment rights. Here the City of Springfield has utilized an unconstitutional theater licensing ordinance to impose a prior restraint. The decision of the United States Court of Appeals for the Seventh Circuit has abandoned the true meaning and impact of *Wooley v. Maynard*, 430 U. S. 705 (1977). The abstention decision stands in stark conflict with other federal courts which recognize the important difference presented in civil rights cases that seek only non-interfering prospective relief.

Indeed, the Seventh Circuit Court of Appeals has been inconsistent within itself. In *Bickham v. Lashof*, 620 F. 2d 1238, 1241-1246 (7th Cir., 1980), another panel of the circuit held that a request for prospective injunctive relief in a federal civil rights action against the enforcement of an anti-abortion statute was not barred under *Younger v. Harris*, 401 U. S. 37 (1971), or *Huffman v. Pursue, Ltd.*, 420 U. S. 592 (1975), even in the face of a pending state proceeding in which the constitutionality of the statute could be raised.

This Court should recognize the flagrant prior restraint that has been imposed against the operation of the Frisina Theater in this case. This Court should further recognize the distinction previously established by this Court in *Wooley v. Maynard,* 430 U. S. 705 (1977), where prospective relief only is sought in a federal civil rights case, and which relief will not interfere with nor annul any pending state court proceedings. The abstention doctrine of *Younger v. Harris* is not applicable to this case, and accordingly, the Writ of Certiorari should be granted, the judgment of the United States Court of Appeals for the Seventh Circuit reversed, and the cause remanded with directions to the United States District Court for the Central District of Illinois to take jurisdiction of the cause and proceed to the merits of petitioner Southland News' request for preliminary injunctive relief.

CONCLUSION

For the aforesaid reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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October, 1980

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Heard May 7, 1980

June 27, 1980

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. WALTER J. CUMMINS, Circuit Judge

Hon. PHILIP NICHOLS, JR., Associate Judge*

SOUTHLAND NEWS, INC.,

Plaintiff-Appellant,

No. 80-1526 vs.

THE CITY OF SPRINGFIELD, an Illinois municipal corporation, and MICHAEL HOUSTON, in his capacity as Mayor of the City of Springfield,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield, Illinois
No. 80-3086
Harold A. Baker, Judge

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* The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

ORDER

Plaintiff, a Kentucky corporation, filed this complaint based on 42 U. S. C. §§ 1983 and 1985, seeking a district court order directing the City of Springfield, Illinois, and its Mayor to issue a license to the plaintiff so that it can operate the Frisina Theatre, a motion picture theatre located at 3220 Lake Plaza Drive, Springfield, Illinois. Plaintiff also sought a declaratory judgment that Chapter 42A of the Springfield City Code is unconstitutional, an injunction against the enforcement of the ordinance, money damages and attorneys' fees. The district court found that *Younger v. Harris,* 401 U. S. 37 required it to abstain from deciding the case pending completion of related state court proceedings and therefore refused to issue a preliminary injunction. Plaintiff took this interlocutory appeal from the denial of injunctive relief pursuant to 28 U. S. C. § 1292 (a) (1). On May 2, 1980, this Court denied plaintiff's motion for an injunction pending appeal but granted plaintiff's alternative request to expedite the appeal and thus heard oral argument on May 7, 1980. We now affirm the decision of the district court.

According to the verified complaint, Frisina Enterprises, Inc. had been operating the Frisina Theatre during 1979 under a license that expired on December 31, 1979. During January and part of February, 1980, the theatre continued to be operated without a new license.[1] On Feb-

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1 The City's practice was apparently to allow all theatres a thirty-day grace period after the sending of the renewal notices around the first of the year before sending a second notice. But plaintiff has not explicitly contested defendants' assertion that no other theatre was then operating without a license (Br. 2).

ruary 20, 1980, European Investments, Inc., a Bahamian corporation, acquired the theatre and leased it to another corporation, Entertainment World, Inc. The latter company, which allegedly was authorized to do business in Illinois, immediately assumed operations but altered the programming of the theatre, which is located in a predominantly residential neighborhood, to include sexually explicit films. Entertainment World simultaneously applied for a license under Chapter 42A of the Springfield ordinances (Appendix *infra*), but no license ever issued. On February 29, Springfield police officials arrested Larry Hall, an employee of Entertainment World, Inc., and charged him with operating a theatre without a license. After being threatened with action by the fire marshall, Hall agreed not to reopen the theatre until a license was issued (plaintiff's br. 10).

On March 11, through the efforts of Hall and others, plaintiff, an inactive Kentucky corporation, became qualified to do business in Illinois. Hall was then and is now plaintiff's president, treasurer, registered agent and sole shareholder. Having leased the theatre and, according to the complaint, desiring to exhibit movies "dealing with sex and nudity in a frank manner * * * directed solely to an adult audience," plaintiff applied for a license under Chapter 42A. The application did not disclose the name of the plaintiff, as the applicant, listing only Hall as manager. On March 20, James Parente, an attorney for the City and the Mayor orally examined Hall, ostensibly to determine who owned, operated or controlled the theatre.

On March 24, these defendants advised plaintiff that its application for a theatre license was being denied be-

cause plaintiff "was a subsidiary of another corporation [European Investments, Inc.] and * * * management employee, Larry Hall, received compensation from other corporations" (par. 6 (k) of complaint). Hall's "lack of managerial experience or expertise" was later given as an additional reason for denying the license (par. 6 (l) of complaint). Defendants suggested that the actual owners, operators and controllers of the Frisina Theatre file a second application, but none was forthcoming. Negotiations between the City and the theatre continued. In the meantime, on March 28, the City filed a state court quasi-criminal proceeding against Hall for originally operating the theatre without a license.

On March 31, plaintiff filed this lawsuit, claiming that the threat of arrest and prosecution under Section 42A.2 of the Springfield City Code rendered the City's denial of a license an absolute prohibition on exhibiting any films at the theatre. The gravamen of the complaint was that this result under Chapter 42A of the ordinances suffers from four constitutional infirmities under the First and Fourteenth Amendments (pars. 7 (a)-(d)).[2] On April 7, 1980, the district court, *sua sponte,* raised the issue of equitable restraint in the face of the pending prosecution of Hall in state court and defendants thereafter filed a motion to dismiss the lawsuit on that ground. Defendants argued that since the state had commenced the prosecution against Hall under the challenged chapter of the Springfield Code and that prosecution was still pending, the rule

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2 On April 10, 1980, plaintiff filed a motion to amend its complaint by adding two additional grounds for holding the ordinance unconstitutional (pars. 7(e) and (f) of Record Item 9).

of *Younger v. Harris* was fully applicable. On April 18, 1980, Judge Baker denied plaintiff's application for a preliminary injunction and declaratory relief, finding that Hall can challenge the constitutionality of the Springfield ordinance in his prosecution then pending in the Circuit Court of Sangamon County, Illinois, and that Hall's relationship to the instant plaintiff justified applying *Younger* and its progeny.

Application of the YOUNGER Doctrine

In *Younger v. Harris,* 401 U. S. 37, the Supreme Court, with only Justice Douglas dissenting, held that the principles of equitable restraint and the doctrine of "Our Federalism" prevented federal courts from directly enjoining pending state court criminal prosecutions solely on the basis of some allegation that the state action was premised on an abridgment of constitutional rights. It found that the pendency of state proceedings in which the federal plaintiff could raise his constitutional claims as a defense precluded any finding by the federal court of irreparable injury and that the issuance of an injunction would in any event transgress the settled policy of endeavoring to protect federal rights "in ways that will not unduly interfere with the legitimate activities of the States." 401 U. S. at 44. In a companion case, the Court held that under most circumstances federal declaratory relief would constitute a similarly undesirable interference with state proceedings. *Samuels v. Mackell,* 401 U. S. 66. Originally concerned with state criminal proceedings, the Court later extended this abstention doctrine to cases involving a state civil proceeding that "in important respects is • • • akin to a criminal prosecution." *Huffman v. Pursue, Ltd.,* 420

U. S. 592, 604; see also *Grandco Corp v. Rochford*, 536 F. 2d 197, 206 (7th Cir. 1976).

In this case, Larry Hall, plaintiff's president and manager of the theatre, is the subject of state court proceedings upon his February 29 arrest for operating the Frisina Theatre without a license. That action was scheduled to be tried in the Circuit Court of Sangamon County on June 25 and was tried on that date. Defendant Hall intends to appeal his $25 fine. The state court proceedings, which both parties characterize as quasi-criminal, are within the type that gives rise to the policies of *Younger*. Instead of continuing to pursue its remedies through the state court action, plaintiff has petitioned the district court for an injunction against "the defendants and their agents and officers" to prevent them from further enforcing Chapter 42A because it is unconstitutional. It has also sought declaratory relief. Clearly, the state court proceedings are still pending and will afford plaintiff an adequate opportunity to raise its constitutional claims through state appellate proceedings. *Moore v. Sims*, 442 U. S. 415, 430. Indeed, plaintiff's counsel acknowledged at oral argument that the constitutional invalidity of the ordinance will be a prominent part of Hall's defense. As a result, the policies of *Younger* are fully applicable and the district court was correct in not deciding the case.[3]

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3 Abstention under *Younger*, unlike abstention under *Railroad Com'n v. Pullman Co.*, 312 U. S. 496, requires outright dismissal of the federal suit. *Gibson v. Berryhill*, 411 U. S. 564, 577; see also *Hicks v. Miranda*, 422 U. S. 332, 348, 350; *Roe v. Wade*, 410 U. S. 113, 127; Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 194-195.

To avoid this result, plaintiff highlights two factors that, it argues, take this case outside of the usual *Younger* mold. First, it suggests that although state proceedings involving Hall are still pending, plaintiff itself "has not tried to operate in violation of the Springfield Theatre Licensing Ordinance and rather has sought lawful redress of its federal civil rights in federal court" (Br. 26). This statement represents an attempt to distinguish between the parties in the federal and state suits. But adoption of any such distinction is foreclosed in this case by the Supreme Court's reasoning in *Hicks v. Miranda*, 422 U. S. 332. In *Hicks*, plaintiffs were operators of a movie theatre who sued in federal court for an injunction and a declaratory judgment, alleging that copies of film they owned had been seized in violation of the First and Fourteenth Amendments. State officials had seized copies of the film from plaintiffs' theatre and arrested two employees under the state obscenity statute. Proceedings in the state court had begun against the two employees, and two of the plaintiff theatre operators were subsequently added as defendants. The Supreme Court indicated, however, that even if the plaintiff operators had not been joined, it was improper for the district court to reach the merits of the federal suit because those federal plaintiffs had a substantial stake in the state proceedings in that their interests and those of the defendant employees were closely intertwined. The federal action would thus interfere with a pending state prosecution in which plaintiffs could fully vindicate their claims.

Here Hall as plaintiff's president, treasurer, registered agent and sole shareholder was simply plaintiff's *alter ego*.

Plaintiff and Hall are represented by the same counsel and, as in *Hicks*, Hall can ensure that plaintiff's federal claims are fully aired in the state courts. This substantial intertwining of interests is of the sort contemplated in *Hicks* as warranting application of the *Younger* rule. Such a communality of interest, moreover, serves to distinguish this case from *Bickham v. Lashof*, — F. 2d — (7th Cir. No. 78-2559, April 29, 1980), in which the interests of the state and federal parties were not the same and in which considerable doubt existed whether the state court defendant could properly raise the constitutional claims of the federal plaintiff. In the absence of such factors, this case falls squarely within the type of action governed by *Younger*.

Plaintiff's second contention is that because its complaint seeks prospective relief only and does not ask the district court to enjoin the state court proceeding, the federal action will not engender the kind of interference in state proceedings *Younger* sought to proscribe.[4] In support of this argument, plaintiff cites the Supreme Court's 1977 decision in *Wooley v. Maynard*, 430 U. S. 705. In *Wooley*, the federal plaintiff sought to enjoin state enforcement of a New Hampshire statute requiring that motorists display the state's motto "Live Free or Die" on their auto license plates. Plaintiff had thrice previously been found

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4 The complaint prayed for an injunction against defendants', their agents' and officers' enforcement of Chapter 42A (par. V of complaint). This phraseology would seem broad enough to encompass the pending prosecution of Hall. Nevertheless, both on oral argument and in brief, plaintiff disavowed any intention to block that prosecution. Therefore, we interpret the complaint as seeking only prospective relief.

guilty of taping over the motto but after refusing to pay fines he had served the resulting jail term and not appealed his convictions. No state court proceeding was pending against him when he filed the federal suit. Noting that plaintiff was seeking to proscribe only future enforcement of the statute and was not attempting to attack collaterally the earlier state court judgments the Supreme Court found *Younger* abstention unnecessary and proceeded to the merits of the case.

Although the need for some general means of granting such prospective relief in the *Younger* context has been noted, (see *Eagle Books, Inc. v. Ritchie,* 455 F. Supp. 73 (D. Utah 1978); *Boe v. Colello,* 438 F. Supp. 145 (S. D. N. Y. 1977); Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief,* 1977 SUP. CT. REV. 193), there are several reasons to believe that *Wooley* does not presage the development of a special rule for such cases. First, the Court in *Roe v. Wade,* 410 U. S. 113, specifically held before *Wooley* that a district court must dismiss the complaint of a plaintiff-intervenor who sought relief against both a pending prosecution and threatened future prosecutions. The Court found "no merit" in plaintiff's attempt "to distinguish his status as a present state defendant from his status as a 'potential future defendant' and to assert only the latter * * *." 410 U. S. at 126. This conclusion suggests that the *Wooley* result derived from the highly unusual situation presented there in which the federal plaintiff was not subject to any continuing prosecution, and the state's interest in the earlier convictions had been completely satisfied. In such a situation, the federal court cannot be said to interfere

with any pending state action and plaintiff has no forum in which he can raise his constitutional claims. *Wooley* would not similarly govern a case in which, as here, a state prosecution was still pending.

In addition, the Supreme Court's considerations of the broader implications of the *Younger* doctrine has yielded a rather broad notion of what constitutes "interference" with state proceedings. Thus in *Wooley* the Court was at pains to emphasize that the plaintiff was in no respects attempting to annul the effect of the previous state court convictions. 430 U. S. at 711. Likewise, the Court's treatment of declaratory judgments as similar to injunctions for *Younger* purposes evinces considerable sensitivity to any practical influence upon the state court that federal action on the merits of the federal plaintiff's claims might have. See *Samuels v. Mackell*, 401 U. S. 66, 72. Like a declaratory judgment, an injunction, even if prospective only, adjudicates the rights of the parties with respect to the challenged state statute and has the practical effect of allowing the federal court to decide a significant part of the case before the state court. Even assuming the federal determination is not accorded *res judicata* effect, as perhaps it should be,[5] the state court charged with deciding the merits of the state proceeding will hardly be able to ignore the results of the federal determination.[6] Finally,

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5 Cf. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978) (suggesting that state court determinations in the *Younger* context might have *res judicata* effect in federal court).

6 It is noteworthy that here plaintiff sought both injunctive and declaratory relief.

although we acknowledge the special problems occasioned by a request for prospective relief, we do not believe the Court would accommodate these concerns by permitting a federal plaintiff to dodge the *Younger* result through the simple expedient of fashioning its federal complaint to request prospective relief only. But see Laycock, *supra*, at 213. We do not think plaintiff should be able to do so in this case.[7]

YOUNGER Exceptions Inapplicable

There are exceptions to the *Younger* doctrine and plaintiff here argues that its case falls within two of them. First, plaintiff argues that defendants' oral examination of Hall and ongoing investigation into the controlling interest in plaintiff were undertaken merely to harass plaintiff and that defendants' denial of a license is thus in bad faith. In considering this argument, it is significant that the validity of the ordinance in question has not previously been adjudicated so that this is not a case in which officials were using an ordinance of questionable validity in repeated efforts to harass plaintiff. The Supreme Court has indicated its reluctance to find bad faith where defendants' actions are grounded in some reasonable authority. See *Hicks v. Miranda*, 422 U. S. at 351.

At the same time, defendants' application of the ordinance was arguably reasonable. Chapter 42A.8 (5) of the ordinance specifically empowers the May (sic) of Springfield "to examine or cause to be examined under oath any

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7 Even if abstention were not applicable, the district court would have to decide the constitutionality of the ordinance in the first instance. *Singleton v. Wulff*, 428 U. S. 106, 119-121; *Zbaraz v. Quern*, 596 F. 2d 196, 202 (7th Cir. 1979), jurisdiction noted on other grounds, 48 LW 3356.

applicant for a local license." Since an apparent purpose of the statute is to establish who is in control of a theatre and since this application was unusual in that it did not even disclose the name of the corporate applicant, it was quite proper for the Mayor to invoke this power here even if he had not done so far other applicants in the past.

In addition, the record reveals considerable confusion regarding the true owners and management of the Frisina Theatre. In his deposition, Hall stated that plaintiff leases the theatre from Entertainment World, Inc., and pays that corporation rent (Dep. 10). Yet defendants assert that Entertainment World is not authorized to do business in Illinois (Record Item 10 at 2 of Supporting Memorandum), and it appears that Entertainment World in fact leases the theatre from European Investments, Inc. (Pacente Dep. 65), a Bahamian corporation that receives the theatre's profits (Plff. Exh. 5). As late as February 22, meanwhile, theatre receipts were deposited in the account of Frisina Theatre Corporation (Hall Dep. 21), which as it now appears is not even legally incorporated (4/17/80 Tr. 11). Further, Hall testified that another organization, Modern Bookkeeping Services, took care of the theatre's advertising and also paid various filing fees (Hall Dep. 42, 45, 46-48).

Hall testified that he was hired to run the theatre, but that he did not know who his employer was (Dep. 37). Modern Bookkeeping Services apparently paid his salary, although the interest of that corporation in the theatre is unclear. Hall testified that he did not believe he was an employee of Entertainment World, Inc. (Dep. 39), but the complaint states that he was (Complaint at 4). Plaintiff corporation has apparently been running the theatre,

though its name does not appear on the license application and it appears to be paying rent to a corporation that is not authorized to do business in Illinois and is not the true owner of the theatre.

The defendants understandably invoked their investigative authority in the face of such confusion. Further, although there was some evidence that the Mayor was staunchly opposed to the showing of sexually explicit films at the theatre, defendants have stated their willingness to issue a license once plaintiff provides the needed information (Br. 24). Such a record on the intentions of the city officials falls far short of the specific evidence of harassment that we have required for application of the bad faith exception to *Younger*. *Grandco Corp. v. Rochford*, 536 F. 2d 197 (7th Cir. 1976).

A second exception to the *Younger* doctrine is available when "a statute [is] flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger v. Harris*, 401 U. S. at 53-54, quoting *Watson v. Buck*, 313 U. S. 387, 402. As this language suggests, the exception looks to a law that is not simply unconstitutional on its face but is irretrievably defective. *Huffman v. Pursue, Ltd., supra*, at 602.[8] This is not such a law. Rather it

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8 On the day of oral argument, plaintiff's counsel called our attention to *Broadway Distributors, Inc. v. White*, 307 F. Supp. 1180 (D. Mass. 1970), and *Ellwest Stereo Theatre, Inc. v. Jackson*, — F. Supp. — (No. C79-975A, N. D. Ga. 4/29/80), which invalidated disclosure requirements plaintiff argues are similar to those in the Springfield ordinance. These cases do not, however, involve application of the *Younger* doctrine and do not involve the strict standards of unconstitutionality required for application of a *Younger* exception.

is a simple licensing ordinance authorized by state law. Ill. Rev. Stat. Ch. 24, § 11-42-5 (1979). Theatre licensing requirements are constitutional. *Young v. American Mini Theatres, Inc.*, 427 U. S. 50, 62-63; *Genusa v. City of Peoria*, — F. 2d —, — (7th Cir. Nos. 79-1716 and 79-1717, April 25, 1980) at slip op. 11-12. At oral argument, plaintiff did not even challenge every section of the law, and any infirmities that ultimately may be shown to exist in the ordinance can be cured by way of the severability clause in Chapter 1.5 of the Springfield ordinances. Thus any invalidity clearly cannot be said to infect the entire ordinance, as is required by this exception to *Younger*.

It is true that in *Genusa, supra*, we invalidated substantial parts of an adult use ordinance subjecting "adult bookstores" to restrictions somewhat similar to those at issue in this case. But that ordinance required information in far greater detail than that specified in the one at issue here.[9] In addition, our analysis of that ordinance rested in part on the unequal treatment accorded adult bookstores under the ordinance, treatment ultimately determined to be violative of the Equal Protection Clause. By contrast this ordinance treats all movie theatres identically. Insofar as *Genusa* is applicable to this case, moreover, the state courts can be expected to follow that decision in construing the Springfield ordinance. If Hall and plaintiff do not thereby secure appropriate relief, they are entitled to pursue their remedies through the Illinois ap-

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9 The Peoria ordinance is reproduced in 475 F. Supp. 1209-1215 and is much more exhaustive than the Springfield ordinance appearing in our Appendix. In contrast to this Court's invalidating parts of the Peoria ordinance in *Genusa*, the Supreme Court recently upheld the constitutionality of the Illinois obscenity statute in *Ward v. Illinois*, 431 U. S. 767.

pellate system, and if necessary, on application to the United States Supreme Court. Ultimately, having exhausted all such remedies, they may return to federal court. Thus far from qualifying for an exception to the *Younger* approach, this case presents a situation in which the state and federal courts will function together as *Younger* anticipated. See *Huffman v. Pursue, Ltd., supra*, at 605.

The district court's order denying preliminary injunctive and declaratory relief was correct. We affirm that order with directions to dismiss the suit.

SWYGERT, Circuit Judge, dissenting. In my judgment the mapority decision here results in a serious denial of procedural due process. Plaintiff Southland News will be unable to test the constitutionality of Chapter 42A of the Springfield City Code until a collateral quasi-criminal proceeding against Larry Hall has run its course. Southland News is denied the use of its property—a theatre—for an indefinite period of time by reason of an alleged misapplication of an ordinance that it claims is unconstitutional. No matter how the issues are framed in the state court prosecution, that case will not decide the issues in this prospective injunction proceeding. This case is thus distinguishable on its facts from *Younger v. Harris*, 401 U. S. 37 (1971), and *Huffman v. Pursue, Ltd.*, 420 U. S. 592 (1975), and therefore not an appropriate situation for abstention.

At bottom, the fact remains that Southland News should have a right to bring immediately in federal district court their constitutional challenge that the City refused to grant it a license to exhibit movies because of their content—a classic example of prior restraint.

EXHIBIT B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 5, 1980

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Philip Nichols, Jr., Associate Judge*

SOUTHLAND NEWS, INC.,

Plaintiff-Appellant,

No. 80-1526 vs.

THE CITY OF SPRINGFIELD and MICHAEL HOUSTON, Mayor of City of Springfield,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield, Illinois

No. 80-3086

Harold A. Baker, Judge

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, Southland News, Inc., a vote of the active members of the Court was requested, and a

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* The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

majority of the active members of the Court have voted to deny a rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

EXHIBIT C

First Amendment Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

Fourth Amendment
Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 42A Springfield City Code

THEATRES*

Sec. 42A.1. Definitions.
Sec. 42A.2. License required.
Sec. 42A.3. Separate license required for each location.
Sec. 42A.4. Application for license, information to be shown.
Sec. 42A.5. License fees.
Sec. 42A.6. Restrictions upon issuance of licenses.
Sec. 42A.7. Mayor to enforce ordinances.
Sec. 42A.8. Powers of mayor.
Sec. 42A.9. Duties of clerk.
Sec. 42A.10. Penalty.

Sec. 42A.1. Definitions.

City. The word "city" means the City of Springfield.

Owner, proprietor, [operator]. The word "owner" or "operator" shall include all persons who are owners or operators or are in control of any place where a theatre is conducted or operated.

Person. The word "person" means an individual, group of individuals acting together for a common purpose or organization of any kind.

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* Amendment note—Ord. No. 57-2-72, adopted Feb. 1, 1972, amended this Code by adding Ch. 42A.

Theatre. The word "theatre" means any place within the city wherein any show, moving picture, theatrical exhibition, amusement or entertainment is shown, exhibited or staged and for which admission charge is made. (Ord. No. 57-2-72, § 1, 2-1-72)

Sec. 42A.2. License required.

No person shall operate, conduct or maintain a theatre within the city without first having obtained a license to do so as provided in this chapter. (Ord. No. 57-2-72, § 1, 2-1-72)

Sec. 42A.3. Separate license required for each location.

A separate license must be obtained for each location desired by the applicant for a license under the provisions of this chapter. (Ord. No. 57-2-72, § 1, 2-1-72)

Sec. 42A.4. Application for license; information to be shown.

Any person desiring a license authorized by this chapter shall make application therefor to the city clerk. A separate application shall be made for each license desired by the applicant. Such application shall be in writing upon forms prepared and furnished by the city. Each application for a license shall be signed by the applicant and verified by him by oath or affidavit, and shall be filed with the city clerk. In case the applicant is a corporation, the application must list the names and addresses of the president, secretary, treasurer and registered agent in Illinois. In case the applicant is a partnership, all partners must sign and verify the application. In case any other person is to conduct the place of business as manager or agent of the licensee, he also must sign and verify the

application. The information requested in the application form must be furnished as to each person signing the application. Each application shall contain the following information and statements:

(1) *Name, age and address.* The name, age and address of the applicant in the case of an individual; in the case of a partnership, the names and addresses of the partners; and in any case, the name and address of the manager or agent who is to conduct the place of business for which the license is sought.

(2) *Location.* The location where he proposes to engage in the business for which the application was submitted.

(3) *Ownership of premises; name of landlord.* Whether the applicant owns the premises for which a license is sought, and if he does not, the name of his landlord and the term of his lease.

(4) *Suspension or revocation of previous licenses.* Whether or not any license issued to him under this chapter or previous ordinances has ever been suspended or revoked.

(5) *Former convictions of felony, etc.* Whether or not the applicant has even been convicted of a felony, and whether or not he is disqualified to receive the license sought by reason of any manner of thing contained in the laws of the state or this chapter.

(6) *Agreement not to violate ordinances, etc.* A statement that the applicant agrees not to violate any provisions of this Code or other ordinances of this city or any law of the United States or of the state in the conduct of his business, and that in the event such promise is broken or if any statement contained in the application is not true, that the license applied for may be immediately suspended or revoked. (Ord. No. 57-2-72, § 1, 2-1-72)

Sec. 42A.5. License fees.

The license fees required for any license authorized by this chapter shall be in the amount and for the period as shall now or hereafter may be prescribed by sections 28.13 of this Code. (Ord. No. 57-2-72, § 1, 2-1-72)

Sec. 42A.6. Restrictions upon issuance of licenses.

No license authorized by this chapter shall be issued to:

(1) *Persons not of good character.* A person who is not of good character and reputation in the community in which he resides.

(2) *Persons convicted of felony.* A person who has been convicted of a felony under the laws of the state or of the United States.

(3) *Persons convicted of keeping house of ill fame.* A person who has been convicted of being the keeper or is keeping a house of ill fame.

(4) *Persons convicted of pandering, etc.* A person who has been convicted of pandering or other crime or misdemeanor opposed to decency and morality.

(5) *Revocation of former license.* A person whose license issued under this chapter has been revoked for any cause.

(6) *Former convictions of federal or state law.* A person who has been convicted of a felony or crime punishable by a term in a penitentiary as result of violation of any federal or state law. (Ord. No. 57-2-72, § 1, 2-1-72)

Sec. 42A.7. Mayor to enforce ordinances.

The mayor of the city shall be charged with the administration of the provisions of this chapter. (Ord. No. 57-2-72, § 1, 2-1-72)

Sec. 42A.8. Powers of mayor.

The mayor shall have the following powers and duties:

(1) *Granting of new licenses.* To suspend or to revoke for cause, after public hearing, all licenses issued under this chapter to persons for premises within his jurisdiction.

(2) *Right of entry.* To enter into and to authorize any law enforcing officer to enter at any time upon any premises licensed hereunder to determine whether any of the provisions of this chapter have been or are being violated.

(3) *Exercise powers, etc. granted under state law, etc.* To exercise all powers, functions and duties which now or hereafter may be granted to him by this chapter.

(4) *Suspension and revocation of license.* To suspend and to revoke any license issued under this chapter for any of the following reasons:

(a) That the licensee has violated any of the provisions of this chapter.

(b) The permitting of an unlawful, or immoral practice upon the licensed premises.

(5) *Examination of applicants.* To examine or cause to be examined under oath any applicant for a local license. (Ord. No. 57-2-72, § 1, 2-1-72)

Sec. 42A.9. Duties of city clerk.

The city clerk shall receive all license applications, and issue all licenses when directed to do so by the mayor. (Ord. No. 57-2-72, § 1, 2-1-72)

Sec. 42A.10. Penalty.

Whoever violates any of the provisions of this chapter shall, upon conviction, be punished by a fine of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00). (Ord. No. 57-2-72, § 1, 2-1-72)

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD, ILLINOIS

NO. 80-3086

SOUTHLAND NEWS, INC., a Kentucky corporation,

Plaintiff,

vs.

THE CITY OF SPRINGFIELD, an Illinois municipal corporation, and MICHAEL HOUSTON, in his capacity as Mayor of the City of Springfield,

Defendants.

(Filed April 18, 1980)

ORDER

This matter having come before the Court on the 17th day of April, 1980, the plaintiff, SOUTHLAND NEWS, INC., a Kentucky corporation, present and represented by counsel, J. STEVEN BECKETT, RENO, O'BYRNE & KEPLEY, Champaign, Illinois, and the defendants, THE CITY OF SPRINGFIELD, an Illinois municipal corporation, and MICHAEL HOUSTON, Mayor of the City of Springfield, by ROBERT J. McCORMICK and DONALD A. LoBUE, Assistant Corporation Counsel, Springfield, Illinois.

This matter comes before the Court on application for preliminary and declaratory relief concerning the constitutional validity and enforcement of Ch. 42A of the Code of Ordinances of the City of Springfield, entitled "Theatres";

The Court having heard testimony of witnesses, having received plaintiff's Exhibits 1 through 24, inclusive, having heard and considered plaintiff's offer of proof regarding testimony not of record, having heard the statements of counsel, and being fully advised in the premises, finds:

1. There is a pending prosecution for violation of Ch. 42A of the Springfield Code of Ordinances against Larry Hall, individually, in the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois. Further, Larry Hall is the president, treasurer, registered agent, and sole shareholder of plaintiff, Southland News, Inc.

2. That the next scheduled court date in the Courts of the State of Illinois with regard to said case is April 28, 1980 for appearance on arraignment.

3. That Larry Hall can raise the issue of the constitutional validity of said Springfield City Ordinance in said proceeding in the state Court.

4. That the doctrine and principles announced in *Younger v. Harris*, 401 U. S. 37, 91 S. Ct. 746 (1971) apply.

5. That after consideration of all evidence presented to him, the Court does not find the existence of circumstances to provide for exceptions to *Younger v. Harris* principles.

6. A ruling by this Court, in this case, at this time, may interfere, with the pending state Court prosecution of Larry Hall.

7. That the ruling this Court is without prejudice on plaintiff to reapply for preliminary injunctive and de-

claratory relief, or permanent injunctive and declaratory relief, and is without prejudice on plaintiff's prayer for money damages.

THEREFORE, IT IS ORDERED that the application of the plaintiff, SOUTHLAND NEWS, INC., for preliminary injunctive and declaratory relief is denied.

DATED this 18th day of April, 1980.

/s/ Harold A. Baker
Honorable Harold A. Baker
Federal District Judge

Approved as to form:
Robert J. McCormick
Attorney for defendant